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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 736

IVAN E. OAKES,

Petitioner,

vs.

BEN LAKE, as Sheriff of Owyhee County, Idaho,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

Certiorari having been granted by an order of this court (R 99), petitioner desires to add a short supplement touching matters other than the capacity of petitioner to sue in the Federal Court. These matters are:

(A) The facts touching petitioner's possession and related matters;

(B) The jurisdiction of the Federal Courts to entertain claim and delivery actions against an attaching State Sheriff; and

(C) The asserted necessity of a verified claim being presented to the State Sheriff as a prerequisite to bringing this action.

A — FACTS TOUCHING PETITIONER'S POSSESSION

The facts relating to the possession and possessory rights of petitioner following his appointment as receiver of the mortgaged properties of W. S. Skinner and Ella Skinner are narrated in petitioner's brief in support of his petition for a writ of certiorari at pages 11 to 14. The references to the Record made therein, together with the judgment roll in the Skinner foreclosure case (made Plaintiff's Trial Exhibit 1) disclose the Order of Appointment, Receiver's Bond, and testimony showing that the petitioner visited the Skinner ranch, presented his credentials (R 33, 45), inspected the premises, including some of the cattle (R 33, 38), was given a list of cattle by the trustee's (mortgagee's) representative, who was in charge (R 38). He arranged for the maintenance of the ranch, put a man in charge (R 34, 46) and arranged with the Skinners to put up the hay crop on shares (R. 52-54). He also made a report or inventory to the court, charging himself with properties on the ranch, including cattle (R 57, 58).

The facts need not be related in detail but the salient matters are almost identical with the facts shown in *State* v. *Rivers* (1882), 60 Iowa 381, where a receiver's visit to a farm, notification of appointment, and arrangement for tenancy and crops, was held to show sufficient "title" in the receiver to sustain an indictment for larceny from the "owner" of some of the chattels so taken. We

also refer to Judge Sanborn's holding that the delivery to a receiver of the key to a safety deposit box was sufficient to pass title to the receiver of its contents as a symbolic possession. (*Chillicothe Co.* v. *Revelle* (1926), 14 Fed. (2nd) 501.

The court below has treated the case as one of actual possession being assumed (R 93), which assumption is clearly warranted.

Besides this, as pointed out under Point "C" of our Brief in Support of Petition for Certiorari (pp. 33, 34) the petitioner has a property right in the cattle based upon his obligation to account, he having reported the same to the Oregon court and having given his bond conditioned on such accounting.

The very least that may be said is that the question of fact is sufficient to go to the jury, although the admitted requirement for an accounting and petitioner's liability under bond would seem to justify, as a matter of law, an instruction that the petitioner had a sufficient property right in the cattle.

B — JURISDICTION OF THE FEDERAL COURT IN CLAIM AND DELIVERY BROUGHT AGAINST AN IDAHO ATTACHING SHERIFF

Respondent's further contention is that a Federal court has no jurisdiction of this cause as against a State Sheriff holding property seized under a writ of attachment. The thought seems to be that the property so

attached is *in custodia legis,* and that all matters relating to title, and property rights touching the same, are not open to adjudication in other courts and must be determined solely in the court whose sheriff so seized the *res.* In his motion for "nonsuit", respondent's counsel stated his position (R 74):

> "Second, on the ground that the action against the Sheriff, being an action in replevin, will not lie in the United States Court to take property from the possession of a state court."

This statement of the law is probably too broad, but in this case (involving property already *pendente lite* under foreclosure in the Oregon courts) the very statement defeats respondent's asserted right to attach. The mortgaged chattels (cattle) were *in custodia legis* before attachment was made, and the Idaho court had no right to seize them, without doing violence to the Oregon court's rights. A similar contention was denied by the Circuit Court of Appeals, Sixth Circuit, (*North Carolina Land etc. Co.* v. *Boyer, Sheriff* (1911), 112 C. C. A. 162, 191 Fed. 552) holding that the attachment of mortgaged chattels in a state into which the chattels were temporarily brought, pending foreclosure proceedings in another state, subordinates the attachment to the foreclosure proceeding under the doctrine of *lis pendens.*

Idaho recognizes the rights of a foreign chattel-mortgagee as superior to those of an Idaho attaching creditor who has caused the chattels to be seized in Idaho. (*Hare* v. *Young* (1915), 26 Ida. 682; *Smith* v. *Consolidated Wagon Co.* (1917), 30 Ida. 148; *Cont. Nat. Bank* v. *Naylor* (1924), 39 Ida. 267.)

Under the Idaho practice, there is but one form of civil action, the complaint must state the facts in ordinary and concise language without regard to the ancient or common law forms of pleading; the common law action of replevin is not in force; claim and delivery is a provisional remedy and may be sustained if plaintiff states and proves a right of recovery irrespective of whether the personal property be seized or not; a plaintiff cannot be sent out of court unless he is on the facts entitled to no legal relief; and the issue of possession at the time of bringing the action, or the requirement that defendant be dispossessed is not necessary in order that a plaintiff may prevail; it is only necessary that plaintiff has a right to immediate possession. The law has been clearly expounded on all these matters. (*Bates* v. *Capital State Bank* (1912), 21 Ida. 141.)

It is clear to the point of demonstration that no conflict between the federal and state courts is involved, since there is no requirement that the state sheriff's possession be disturbed. In the case at bar no Affidavit of Claim, Requisition to the Marshal, or Claim and Delivery Undertaking, required for the taking of the chattels into the custody of the court below (§§ 6-302, 6-303, 6-304, *Idaho Code,* 1932), was made. There is no conflict of possession before the court.

The same contention was presented under the claim and delivery statutes of North Carolina in *Porter* v. *Davidson, Sheriff* (1894), 63 Fed. 626, before Simonton and Dick, J. J., and held that any conflict because of custody should be relieved by returning the chattels to

the attaching sheriff, but held the sheriff as a defendant liable under the cause of action stated in the complaint. This seems to be squarely in accord with the *rationale* of the Idaho Supreme Court in *Bates* v. *Capital State Bank*, supra.

There is, however, a respectable number of authorities for the entertainment by a federal court of a replevin action against an attaching state sheriff. The reasoning is that an attaching sheriff taking the property of a stranger to the writ of attachment is as much a trespasser as any other person and subject to the same actions; to be entitled to immunity, his possession must be lawful. Our Ninth Circuit Court of Appeals so held in *Wise* v. *Jefferis* (1892), 51 Fed. 641, 643, following *Sweeney* v. *Lomme* (1874), 22 Wall. 208.

Wood v. *Weimar* (1881), 104 U. S. 786, sustained a replevin in the Federal Court by a chattel mortgagee against an attaching Michigan sheriff. Waite, C. J. supported this right (p. 792) since the Michigan Supreme Court had held that a sheriff attaching mortgaged goods must surrender them to the mortgagee on demand (*King* v. *Hubbell*, 42 Mich. 597). The Idaho Supreme Court held in *Continental Bank* v. *Naylor* (1924), 39 Ida. 267, that an attaching Idaho sheriff must surrender possession of attached sheep to the "live stock lessor" (equivalent to chattel-mortgagee) although the "lease" was made in Utah (where it was valid) and thereafter for a period of years, the sheep were brought into Idaho, where the "lease" was not recorded, the "lessee" having signed a relinquishment of the "lease" to the "lessor" fifteen days

prior to the bringing of the attachment action. "The seizure of these sheep under attachment was wholly unwarranted, and without right," says the court (39 Ida. 275). This would clearly imply the "lessor's" right to a claim and delivery against the sheriff had the lessor chosen to bring that action instead of intervention; and, by parity of reasoning, a mortgagee of diverse citizenship, might have brought the action in the Federal Courts as in *Wood* v. *Weimar,* supra. Respondent herein, having the right to possession, as shown in our brief in support of his Petition for Certiorari, should have the same right.

Idaho took her claim and delivery statutes almost literally from California and North Dakota. (See Notes, Comp. Leg., to §§ 6-301 to 6-312 *Idaho Code, 1932*). California has held the attaching sheriff in such cases to be a trespasser and liable in an appropriate claim and delivery action (*Kellogg* v. *Burr* (1899), 126 Cal. 38; and the reasoning of North Dakota's Supreme Court supports the proposition that an attaching sheriff has no right so to possess chattels as against a foreign receiver (*Woodhull* v. *Farmers Trust Co.* (1902), 11 N. D. 157.

C — REQUIREMENT THAT VERIFIED CLAIM MUST BE SUBMITTED TO SHERIFF BEFORE ACTION MAY BE BROUGHT

A third contention of respondent in moving for a "nonsuit" was that the demand for the attached cattle made by petitioner Oakes upon the respondent sheriff was insufficient as not being in verified form as prescribed by the statutes (§ 6-527 *Idaho Code, 1932*) which reads:

> "If any personal property attached be claimed by a third person as his property, the same rule shall prevail as to the contents and making of said claim, and as to the holding of said property, as in the case of a claim after levy on execution, as provided in § 8-202.

The provision found in § 8-202 relating to execution and the claim of third parties is as follows:

> "If the property levied on be claimed by a third party as his property by a written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property, unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an undertaking by at least two good and sufficient sureties."

These sections provide a method by which the right of the third party may be determined by the sheriff and before the sheriff himself. Under no rules of construction can this method exclude a right of action which a third party may have and may desire to enforce in some other court of appropriate jurisdiction. Quite to the contrary it would seem that if the "claim" were made before the sheriff it would of itself be recognized as a selection by the third party, of the sheriff as a tribunal to determine his right to the exclusion of any other court.

Now, if the third party has a legal right to possess the property he cannot be required to enforce this before the sheriff who has unlawfully seized it. As a matter of right, he should sue in some other court.

It is clear from the quoted sections that the purpose of this "verified claim" is to protect the sheriff in the demand made upon him. The language of this section clearly shows that the sheriff may on a verified claim, that is, having the dignity of a claim supported by oath, take the position that he will not retain possession of the attached property unless the party who has brought the writ of attachment shall indemnify him.

It is pretty well settled that actions in claim and delivery should be based upon a demand made on the party possessing the same and their refusal to recognize the demand. This is, however, subject to exceptions. Thus it has been held by the Idaho Supreme Court in *Leaf* v. *Reynolds* (1921), 34 Idaho 643, that where the defendant in a claim and delivery action contests the case upon the claim of ownership and right of possession, then no previous demand on the part of the plaintiff is necessary. This decision was followed in the later case of *Neitzel* v. *Lawrence* (1924), 40 Idaho 26.

The precise question is whether or not, under the laws relating to attachment, a verified demand must be made before the sheriff before bringing an action in claim and delivery.

A third party may not be compelled to intervene in the attachment proceeding to preserve his property rights. In *Megee* v. *Beirne* (1861), 39 Pa. 50, 63, the court said:

> "But we know of no rule of law that compels him to come in on pain of forfeiting his rights. If a sheriff will seize one man's goods on process against another, the right of the owner to hold the officer

> responsible in this present form of action, is part of the law of property and cannot be denied to the suitor."

This rule has been enforced by the Federal Courts, and in *Nisbeth* v. *Federal Title and Trust Co.* (1916), 229 Fed. 644, 649, the Circuit Court of Appeals for the 8th Circuit said:

> "When the property of a party is seized under a writ of attachment against another, the owner is not confined in his remedy to intervention in the attachment suit. He may intervene or he may bring a suit in replevin or trover for conversion in any court of competent jurisdiction." (Citing Colorado authorities.)

The California statute, prior to recent amendments was similar to the Idaho law, except that it was more stringent, containing almost the same language as § 8-202, with the additional clause:

> "And no claim to such property is valid against the sheriff or shall be received or be notice of any rights unless made as above provided."

In the case of *Kellogg* v. *Burr* (1899), 126 Cal. 38, 42, the Supreme Court of California in a claim and delivery action had this identical question under consideration and after quoting the statute, said:

> "It has been held that said section 689 is intended for the protection of the sheriff (citing authorities). If such claim is made the sheriff is not bound to retain the property unless he is indemnified, and may

> release it without incurring a liability therefore to the plaintiff in an attachment or execution. The sufficiency of the notice is therefor a question between the officer and the plaintiff in attachment."

And that is the purpose of § 8-202 of the Idaho Code. It gives the sheriff an opportunity and reason, where a verified claim is made, to demand indemnity or release the property and minimize the damages for the wrongful taking. It varies the procedure between the sheriff and the attaching creditor and nowhere does it attempt to proscribe the rights of the owner of the property who is left to his election to sue in a separate action or make his claim before the sheriff.

To the same effect is *Montgomery* v. *Kirksey* (1925), 27 Ariz. 356; *Dimsdale* v. *Tolerton Co.* (1911), 151 Iowa 425; *Hannan* v. *Connett* (1897), 10 Colo. Ap. 171. We have found no opposing authorities.

The purpose of such a "demand" is to show an assertion by the plaintiff of his right to possession and give to the defendant an opportunity to comply therewith and save himself costs and expenses involved in litigation.

It would seem, as a matter of principle, that one, who has a right of action, may not be compelled to have that cause limited to, and be controlled by, a "claim" which must be filed with the offending party and subject to determination on the merits by that party himself.

CONCLUSION

Petitioner respectfully submits that the opinion, judgment and decree of the court below disclose manifest and reversible error in affirming the judgment of the trial court dismissing petitioner's action; and that the cause should now be reversed and a new trial ordered.

Respectfully,

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Portland, Oregon,
September 12, 1933.